MAINTENANCE RIGHTS FOR MUSLIM WIVES IN INDIA: LEGAL RESPONSE

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ABSTRAK

Hak untuk mendapatkan nafkah bagi isteri dan isteri yang diceraikan telah dijelaskan secara terperinci di dalam perbincangan Fiqh. Bagaimanapun prinsip Perundangan Islam tentang pernafkahan ini telah menimbulkan beberapa masalah perundangan apabila ia cuba dilaksanakan di India. Keputusan Mahkamah Agong dalam kes Shah Bano telah mencetuskan kontroversi dalam perkembangan Undang-undang Islam di India. Keputusan ini menggambarkan bahawa Undang-undang Islam dalam hal nafkah telah diketepikan apabila Shah Bano berhak mendapatkan nafkah dari bekas suaminya seumur hidupnya atau sehingga dia berkahwin lagi. Keputusan ini dicapai kerana Undang-undang Islam dikatakan sebagai gagal untuk memberi perlindungan kepada wanita yang telah diceraikan. Oleh itu artikel ini akan membincangkan isu pembaharuan, pemakaian dan pelaksanaan undang-undang berkaitan dengan nafkah bagi wanita Islam di India.

A Brief Introduction of Islamic Law in India

Islamic Law was established in the Indian Sub-continent as early as the thirteenth century when it came under Muslim rule. During this period of time, Islamic Law together with local customs was the law of the land. However the peak of the application of Islamic law in India was in the reign of the ruler Aurangzeb (1658-1707) when he ordered the collection of the Hanafi legal response into legal digest

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which to be applied in the court.[1] This collection was well-known as the Fatawa Alamgiri (taking after his name) or also Fatawa Hindiya (hereinafter the Fatawa).

Apart from this digest Aurangzeb's court also consulted the Hanafi's classical manual namely al-Hidaya of al-Marghinani in their legal and administrative order. Thus, the Fatawa and the Hidaya constituted the most important legal documents at the time. They continued to serve as an important legal reference even in the period of English rule, where both of them had been translated into English in order to make the provision of Islamic Hanafi law applicable in India, available and at the disposal of English magistrates.

When India came under British administration, in the eighteenth century nearly every aspect of Islamic law in the Indian sub-continent was either gradually modified or abolished. However, the personal matters of the local inhabitants, Muslims and Hindus were still governed by their religious laws. It was a matter of policy on the part of the British colonial government not to interfere with the local customs and personal regimes, unless it was necessary to do so, on public interest. This can be seen for example in the case of *Robba Khanum v Khodad Boman Irani*[2] and *Rakeya Bibi v. Anil Kumar Mukherji*[3], where the personal law of the parties was ignored by the court on the ground of justice, equity and good conscience, which in fact was the English rules and principles.

Thus, under Warren Hastings's scheme, it was provided that Muslims were to be governed by their laws in suits regarding inheritance, marriage and caste and other religious usages and institutions.[4] That is to say Islamic personal law was to be applicable to the Muslim in India.

However, the administration of Islamic Personal law was no longer conducted by Muslim but rather by the British or local officers who had been English law-trained. Having no sufficient knowledge in Islamic Law, mistakes frequently occurred in

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1 Pearl, D, (1987), *A Textbook on Muslim Personal Law*. 2nd ed., London: Croom Helm, p. 20

2 1948 ILR Bom 223

3 1948 ILR 2 Cal 119

4 Regulation II of 1772, Art. 27

deciding cases involving Islamic principles.[5]

The administration of Islamic personal law by the British officers led to the creation of a unique system of law. This system was aptly termed Anglo-Muhammadan law and is essentially different from traditional shari'a law.[6] Although the basic feature of Anglo-Muhammadan law is Islamic, the interpretation of it has coloured by English legal doctrines and principles. The combination of both has thus, created a peculiar system of Islamic Law which has never been accepted by traditional Islam. Not surprisingly it has been maintained that Anglo-Muhammadan law and the jurisprudence based on it, is the most successful and viable result of the symbiosis of Islamic and English legal thought in British India.[7]

Reform of Islamic Family law in India

The application of Islamic law in modern India is based upon the Muslim Personal law (Shariat) Application Act of 1937. The name of this Act indicates that Islamic law is applicable only in personal matters. In section 2 of the 1937 Act it is explicitly provided that the law of the Shariah and not custom and usage will govern all Muslims irrespective of their schools of law and castes. This provision includes all personal matters such as marriage, dissolution of marriage, maintenance, inheritance, gifts, trusts and waqf.[8]

Contrary to its title, the 1937 Act cannot be regarded as a code of family law, since the Act has no provisions whatsoever relating to the substance of family matters. The Act is too brief and short to be considered as a code of family law when compared to other codes of family law of other countries, especially Middle Eastern countries. Among them are the Jordanian Law of Family Rights (1951), Syrian Law of Personal Status (1953) and Tunisian Code of Status Personnel (1956). These codes have been considered among the most complete and comprehensive family codes in the Muslim world. For the substance of personal matters one is largely referred to the traditional Islamic law, namely the Hidaya and the Fatawa and also

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5 For example in the case *Sibt Mohammad v. Mohammad Hamid, 1948 ALL 625* concerning the legitimacy of children; the *Shah Bano case, AIR 1985 SC 945*, pertaining to the question of post – 'idda maintenance from a former husband. For details of cases and discussions see Kashi Prasad Saksena, (1972) "Need for a Code of Muslim Law" in *Islamic Law in Modern India*, ed. T. Mahmood, Bombay: N.M. Tripathy Private, pp. 134-136 and also see T. Mahmood, (1986) Personal Laws in Crisis, New Delhi: Metropolitan Book Company, pp. 51-94

6 Coulson, (1964) A *History of Islamic Law*. Edinburgh: University Press, p. 164

7 Schact, (1964) An *Introduction to Islamic Law*. Edinburgh: University Press, p. 96

8 Section 2 of 1937 Act

to the works of Islamic scholars whose works are considered to be authoritative in the field, such as Abd al-Rahim's principles of Islamic law and Mullah.[9] Thus it could be said that the Act of 1937 only serves as the legal basis for the application of Islamic personal law in India, no more or less than that.

Nevertheless, because of the changing of the societies in India and pressure to prevent some bad practices in family life, reform on some part of Islamic personal law was unavoidable, At first the reform was made as the result of the promulgation of the Indian Evidence Act 1872 was paramount intended for general purposes, has affected the Islamic Personal law on the question of legitimacy of a child.[10]

Following the Evidence Act 1872, more reform has been made and this time as the result of the promulgation of other Acts but as a direct modification of the Islamic traditional law. A number of acts concerning reform of Islamic Family Law have been passed in subsequent years. The Child Marriage Restraint Act was passed in 1939. These Acts have substantially modified and to a certain extent abandoned Islamic principles, especially Hanafi rules, pertaining to the question of child marriage and marriage dissolution. The Child Marriage restraint Act 1929 for example has abolished the unfettered right of a guardian of a minor to conclude a marriage of his minor. The primary aim of this Act is to restrain and limit child marriage but not to render any marriages entered into contravention of its provision as void or avoidable.[11] Whereas the Dissolution of Muslim Marriage Act 1939 has reformed the classical Hanafi law, firstly on the question of option of puberty where a minor who has been forcibly married by her or his guardian, upon attaining the age of puberty has the right to terminate their union. Secondly, a wife through this Act has a right to terminate her marriage on the grounds spelled in section 2 of the Act. Such grounds are for example desertion of the husband from his marital home, failure to provide maintenance, husband's imprisonment, failure to perform marital obligation, certain severe or chronic mental defects and any cruelty or maltreatment. These grounds to terminate a marriage were actually taken from the Maliki schools of law which has been adopted in many Islamic Personal law codes of the Middle Eastern countries. For this reason it has therefore been maintained that the 1939 Act was only a reform of the Hanafi law of marriage dissolution not as reform to the Islamic personal law as a whole. The 1939 Act, however, did not affect the arbitrary power of a husband to divorce his wife through extra-judicial means that is *ṭalaq*.

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9 T. Mahmood, (1980) *The Muslim Law of India,* Allahabad: Law Book Company, pp.15-16

10 Section 112, Indian Evidence Act 1877

11 Lila Gupta's case, AIR 1978, SC. 1351

Apart form these Acts; there are other areas, which are considered as the most momentous aspect of Islamic Family law, which have not been reformed yet. This can be seen particularly on the question of polygamy and extra-judicial marriage dissolution or *talaq*. No legislation has yet been enacted to reform these matters. Thus, the traditional law of Islam in these matters is still applied in India. Ironically this is contrary to Hindus who are prohibited by the law from contracting a bigamous marriage. The traditional Hindu law which permits such marriage was reformed by the Hindu Marriages Act 1955.[12] The Act only permits a monogamous union.

Islamic Family Law in India today is administered by the ordinary civil courts[13] which are manned by common-law trained judges. Since there is no unified codification on

Islamic Family law in India, no doubt that the door is open and has always been open for the court to employ judicial interpretation of certain principles of law. The courts in many instances are likely to fall into mistakes and often pass confused decisions on Islamic family matters.[14] Moreover, there is no system of Qadi's courts or at least a division of Muslim family law in the court system in Indian judiciary. The Qadi's courts were abolished during the British colonial rule even though the Kazis Act 1880 is still applicable. But this Act is only for religious functionaries who have no judicial force.[15]

The Rights of Maintenance for Muslim Wives

In India, a Muslim wife may claim her right of maintenance through civil or criminal proceedings. Under the former, proceedings under the Dissolution of Muslim Marriages Act of 1939 provide that inter alia, a wife may bring suit for dissolution of marriage by *fasakh* on account of husband's failure to provide maintenance during the subsisting marriage.[16] Classical Hanafi rules are applicable to the parties since no provision was provided in any legislation on the question. Under the latter proceedings, section 488 of the Criminal Procedure Code 1898 is regarded as a speedy remedy to wives who have been neglected by their husbands. Thus, the question of maintenance in Indian court is largely procedural. Section 488 of the 1898 Code provides that

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12 Hindu Marriages Act (1955), Section 13

13 Seventh Schedule, List III, nos. 5 and 46 of Indian Constitution

14 Particularly on the recent issue of maintenance in Shah Bano's Case, AIR 1985 S.C 945

15 T. Mahmood, (1980) *The Muslim Law of India*, Allahabad: Law Book Company, p.12

16 Section 2 of the Dissolution of Muslim Marriages Act of 1939

"Order for maintenance of wives and children:-

(1) If any person having sufficient mean neglects or refuse to maintain his wife or his legitimate or illegitimate child unable to maintain itself, a Magistrate of first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for her maintenance of his wife or such children, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

Section 488 of the Code establishes the right of wives and children to maintenance. The wife in seeking relief under this section, has to show that she has a "just ground" for refusing to live with her husband without forfeiting her right to maintenance. In *Mohammed Haneefa v. Mariam Bi,* the court recognized the fact that the husband having married another wife constituted a "just ground" and therefore is in the line with the provision under section 488 of the 1898 Code.

It is thought that this provision contradicts the Muslim law of maintenance. Under Islamic traditional law a wife who refuses to cohabit with her lawful husband without any good reason shall forfeit her right to maintenance. Polygamy is not a good reason for refusal to cohabit under Islamic law. In fact the court in another case, *Baddruddin v. Aisha Begum*[17] emphasized that the provision under section 488 of 1898 Code is a general law which applies to all Indians irrespective of their religions and castes. Therefore it is not affected by any provision of the wife's personal law despite the Muslim Personal law (Shariat) Application Act 1937. Although section 488 is a remedy for Muslim wives to claim maintenance, the Muslim husband on the other hand could easily divorce his wife by way of *talaq* if he refuses to provide maintenance.

However in regard of this provision of the 1898 Code, the court has no authority to pass an order for maintenance in favour of a divorced wife during the period of *'iddah.* In fact, the Dissolution of Muslim Marriages Act, 1939 does not make any provision concerning the wife's right to claim maintenance after the dissolution of marriage. Therefore, the court will apply the principle of *nafaqah al'iddah.*[18]

However, this 1898 Code is no longer enforced in India. The Indian Criminal Procedure Code 1973 repealed the Criminal Procedure Code 1898 which was

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[17] All. I. J. (1957) 300

[18] Tahir Mahmood, (1980) *The Muslim Law of India*, Allahabad: Law Book Company, p. 131

applied to all Indian irrespective of their religions and castes. The Indian Criminal Procedure Code 1973 compared with the former 1898 Criminal Procedure Code changed two basic aspects of a wife right to maintenance. Firstly, the words "wife who is unable to maintain herself" has been added into the Criminal Procedure Code 1973.[19] That is to say only a wife who can prove her inability to maintain herself financially is entitled to claim maintenance. This section applies to all women either during subsistence of her marriage or after divorce. The 1898 Criminal Procedure Code provided that all wives whether unable to maintain themselves or not were entitled to claim maintenance. In this sense the 1973 Code seems contradict to the Islamic principle of a wife's right to maintenance. Under Islamic law, a wife is entitled to maintenance irrespective of her financial position. However, if a Muslim wife who has sufficient means cannot claim her maintenance from her husband under criminal proceeding but she can pursue her rights under her personal law in the civil suit. The claim under the civil suit in many instances prove to be unsuccessful to the wife, since the court had been favour the practice of custom which to a large extent undermines the wife rights to her marital benefits.

In India custom has been given official recognition either through statute or court's decision. For example the Charter of the Punjab Laws Act (1872) section 5, which states that all the inhabitants pertaining to their family law, shall be governed any custom applicable, and if in the case of Muslim to their own religious law but not to the contrary of this Act. In a case, a claim of inheritance by a Muslim woman to her father's estate was rejected by the court on the ground that the religious law was not applicable over the prevalent custom which denies her right to inheritance to her father's estate.[20]

Secondly, under the old Code, the wife was entitled to claim maintenance during the subsistence of her marriage only, while the new Code provided relief for a divorced Indian woman to claim maintenance as long as she does not remarry.[21] In other words, section 125 of the 1973 Code has specifically defined the word "wife" to include a divorced wife. This means that a divorced wife is entitled to maintenance until her death or remarriage. This section is clearly contradict to the classical Islamic rules on maintenance where the husband's obligation to provide maintenance ceased by the end of the *'iddah* period.

Later an additional provision under section 127 (3) (b), was inserted in the 1973 Code. This section provides that:

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19 S. 488 (1) of Criminal Procedure Code 1898; S.125 (1) (a) of Criminal Procedure Code 1973

20 1847 Perry's Oriental Cases, 110

21 Section 125 (1) (b) of Criminal Procedure Code 1973

Alteration in allowances:-

(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit: Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) .....Not necessary

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that:

    (a) The woman has after the date of such divorce, remarried, cancel such order as from the date of her remarriage.

    (b) The woman has been divorced by her husband and that she has received, whether before of after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.

The provisions have created some difficulties and confusion especially in ascertaining the meaning of customary payment due on divorce. In the *Bai Tahira* case,[22] the court observed that every divorce wife, Muslim or non-Muslim is entitled to the benefit of maintenance and allowance or any customary payment provided under section 27(3)(b) of the 1973 Code. This would however have to be sufficient for the wife's livelihood. The judge in this case spoke of section 125 as a benign provision enacted to help discarded divorced woman.[23]

The effect of this section is that the husband is no longer liable to pay maintenance beyond the *'iddah* period, if the wife has received the whole sum of the deferred *mahr* which is applicable under customary or personal law of the parties. The court thus, will cancel any order which has been made under section 125 of the 1973 Code, when the wife has received the deferred *mahr*, no matter how small the amount is.

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22 Cr. L.J. (1979), 154

23 Menski, Werner, F., (1990), "The Reform of Islamic Family Law and A Uniform Civil Code for India", in Chibli Mallat and Jane Connors (eds.) *Islamic Family Law*, London: Graham & Trotman, p. 285

In the case of *Shah Bano*,[24] the court held that mahr is not a customary payment due on divorce. *Mahr* according to the court is a consideration for a marriage or a mark of respect for the wife. Therefore, no amount which is payable in consideration of the marriage can possibly be described as an amount payable for divorce. The effect of this judgment was that section 127 (3) (b) was not applicable to the payment of the deferred *mahr* in the case of divorce.

More interestingly, the court in concluding the judgment claimed that there was no conflict between section 125 of the 1973 Code and the Islamic Personal law. The court in deciding this statement based on two arguments. Firstly, the judges believed that, the Islamic law textbooks were inadequate in dealing with the question of a divorced wife who was unable to maintain herself. Thus, the court puts liability upon Muslim husbands to provide maintenance to a divorced wife even after the period of 'iddah has elapsed. Secondly, the court referred to the Quran in Surah al-Baqarah ayat 241-242 which the court viewed that the husband was liable to maintain his divorced wife beyond her *'iddah* period. This means that the court was trying to interpret the word *mut'ah* as maintenance whereas the concept of *mut'ah* and maintenance (*nafaqah*) are different according to Islamic law principles.

This is no doubt that this judgment is quiet radical in modifying traditional Islamic law. Moreover, the fact that the judges in this case were Hindus, the decision provoked enormous anger to Muslims in India where they protest the judgment. In the words of Menski, the *cause celebre* of Shah Bano opened another chapter in the 'war' between state law and Muslim sentiments of the sanctity of personal laws.[25] To reduce the feeling of enmity among Muslims towards the government, the government promptly passed an Act which amended the above 1973 Act. The Muslim Women (Protection of Rights on Divorce) Act of 1986 was passed to curb this tension. This Act is the first codification of Muslim law in India after the promulgation of the Dissolution of Muslim Marriages Act 1939. This Act is very small piece of legislation which has only seven sections. The effect of this Act was that all provisions on section 125 and 127 (3) (b) of 1973 Code are no longer applicable to Muslim. The Muslims were taken out of the ambit of section 125 of the 1973 Code and to place a liability on the divorced woman's natal family or children for her maintenance.[26]

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[24] AIR 1985 S.C. 945

[25] Menski, Werner, F., (1990), "The Reform of Islamic Family Law and A Uniform Civil Code for India", in Chibli Mallat and Jane Connors (eds.) *Islamic Family Law*, London: Graham & Trotman, p. 286, *op. cit.*

[26] *Ibid*, p. 287

Section 3 of the Muslim Women (Protection of Rights on Divorce) Act of 1986 provides that, a divorced woman is entitled to "a reasonable and fair provision and maintenance to be made and paid to her within the *'iddah* period by her former husband". The main effect of this section is to retain a divorced woman's right to *nafaqah al-'iddah* as well as *mut'ah.*

However, the above new Act has been challenged for its validity on the ground that the Act violated provisions of the Indian constitution. The Constitution of India has provided in various articles that equality is guaranteed before the law. All citizens of India are guaranteed fundamental rights by Articles 12 to 25. Under Articles 15, the State shall not discriminate against any citizen for a Uniform Civil Code.

In the light of the above provision under the Indian Constitution, the 1986 Act is claimed to be unconstitutional on the grounds that the 1986 Act violates these various provisions in the Indian Constitution. Moreover the 1986 Act is claimed to be discriminatory and unjust to Muslim women as a violation of Article 15 of the Indian Constitution. In the words of Krishna Iyer, the 1984 Act is believed to be an unjust legislation and ultra virus the Qur'an, the women's basic rights, the law of *waqf,* the family integrity and the law of nations.[27]

Despite the objections to the 1986 Act, the Act remains fully enforced. The *Ali* and *Aliyar*[28] cases were filed under section 3 (1) (a) of the 1986 Act. The court held that the reasonable and fair provision and maintenance shall be made and paid within the *'iddah* period. The court added that the 1986 Act was intended to protect a divorced woman from destitution.

In the later case *Arab Ahmad bin Abdullah v. Arab Dail Mahmuna and another,*[29] the court held that the 1986 Act did not nullify and orders made under the Criminal Procedure Code of 1973 since none of the provisions took away the vested rights crystallized by court orders. Furthermore the 1986 Act did not supersede the

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27 V.R.Krishna Iyer,(1987) *The Muslim Women (Protection of rights on Divorce) Act*, Delhi: Eastern Book Company, p.11-2. Many writers have incoperated with this view for example see Bhajan Kaur (1990) "Muslim Women (Protection of Rights on Divorce) Act, 1986 – Does it really protect?" *KLT, (1)* pp. 69-74, see also Kusum, (1980) "Maintenance of a divorced Muslim Wife: A Critique of the proposed Law", *Journal of Indian Law Institute*, vol. 22, No. 3, p.413; Satish Chandra, (1986) "Muslim women (Protection of Rights on Divorce) Bill, 1986 – A critical Appraisal", Cr. L.J, pp.33-6 and Lucy Carroll, (1986) "The Muslim Women (Protection of Rights on Divorce) Act 1986: A Retrogressive Precedent of Constitutionality", *Journal of The Indian Law Institute*, vol. 28, No. 3, pp. 364-74

28 1988 (2) KLT 94 and 1988 (2) KLT 446

29 AIR 1988 Guj 141

previous decision of the *Shah Bano* case. More significantly, the husband's liability to provide maintenance to a divorced wife is not confined to the period of *'iddah* only. It can be concluded that, even judicial decision have nullified the effect of the 1986 Act compared to the 1973 Code.[30]

Prof. Tahir Mahmood has claimed that the modern Indian provisions on maintenance are much more favourable to women. He has talked about insurance by divorce when a divorced wife is provided with permanent alimony after the dissolution of her marriage.[31]

CONCLUSION

It is clear from the above discussion that even though legal reform particularly in Islamic Family Law has taken place in India, no unified code of Islamic Family has yet been codified. Thus, to a certain extent classical Hanafi law coloured by secular or more correctly English law principles is applicable. The reason for this perhaps rest upon the social and political history of India which is beyond the scope of this article. But to mention some of these, the Muslim for all times has viewed the government with suspicion especially in reforming certain sensitive institutions of the Muslim minority, especially the Institutions of family law.

This is certainly the case of the law of Muslim maintenance where no substantive codification has been made. Thus, the court has to rely upon the classical texts, which are extremely alien and perplexing to a modern court. Because of this reason and others the Indian government has tried to interfere by inserting certain provisions relating to the wife's maintenance into the 1973 Criminal Procedure Code. It is rather curious that such a civil remedy has been made enforceable under a criminal proceeding. This show how desperate, the authorities have tried to overcome the problem. Even though the provisions of the above Act have been repealed by the new Muslim women (Protection of Rights on Divorce) Act 1986, the position of the wife's maintenance is largely the same as it was before those acts. The case law has shown us that the provision of the Act is not enough to deal with the problem of maintenance.

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30 For details of judicial decisions in different states see T. Mahmood, (1990) "Islamic Family Law Latest Developments in India" in *Islamic Family Law*, ed. Chibli Mallat, London: Graham and Trotman, pp. 306-310

31 T. Mahmoo, (1986) *Personal Laws in Crisis*, New Delhi, pp. 127-129

Thus, in conclusion it is suggested a comprehensive code of Islamic Family law which is in line with Islamic law, but which appreciates the local condition of Indian Muslim societies, should be promulgated. This is to avoid any conflicted of judgment in the Indian courts and more important to aid the destitute and helpless Muslim wives and divorced Muslim women.